Supreme Court, U.S.
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No. 01-1263

In The

Supreme Court of the United States

THE PROTESTANT EPISCOPAL CHURCH
IN THE DIOCESE OF MISSISSIPPI,
ST. JAMES CHURCH, AND JERRY MCBRIDE,

Petitioners,

v.

JULIE MABUS,

Respondent.

On Petition For Writ Of Certiorari
To The Hinds County Circuit Court
Of Mississippi, First Judicial District

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners' "Questions Presented" do not fairly and accurately state the issues that would be before this Court should a writ of certiorari be granted.

1.

Petitioners' first question presented asks whether civil suits based on claims of failure to follow "ecclesiastical laws and canons," are barred pursuant to the First Amendment to the United States Constitution. (Petition, page i) Even a cursory review of the Complaint that is attached to the Petition reflects that Julie Mabus alleges the petitioners acted negligently as defined by Mississippi tort law, *not* ecclesiastical law. (Petition, App. 14-23) The question, as stated, misrepresents the nature of the civil suit and, therefore, incorrectly defines the legal issue before this Court.

Simply because Father McBride may have been violating ecclesiastical laws and canons at the same time he was violating Mississippi tort law does not change the fact that Julie Mabus is seeking damages under state tort law theories routinely applied in cases having nothing whatever to do with religious laws or canons. The jury will not be asked to decide whether or not McBride violated ecclesiastical canons, only whether he violated Mississippi tort law. Because the causes of action as pleaded by Julie Mabus are not based on ecclesiastical doctrine, the first question presented should read:

QUESTIONS PRESENTED – Continued

"Is a civil suit against a member of the clergy, and the religious organization of which he is a member, which alleges state tort law claims, outside the subject-matter jurisdiction of the civil courts and barred because of the Religion Clauses of the First Amendment?"

2.

Petitioners' second question presented asks whether the imposition of a "special duty" upon clergy "based solely on religious status or affiliation" violates the Religion Clauses of the First Amendment. (Petition, page i) Julie Mabus disputes that her Complaint requires the imposition of any "special duties" on Father McBride. To the contrary, Father McBride is charged with the same duties as any other Mississippian who would be judged under the state tort laws alleged in the Complaint. These duties are not "based solely on religious status or affiliation" but are required of any Mississippian, irrespective of their religious affiliation. Breach of fiduciary duty, fraudulent concealment, negligent misrepresentation, negligent infliction of emotional distress, negligent retention and negligent supervision are routinely alleged in civil suits throughout the State of Mississippi and the elements required to be proven by Julie Mabus will not differ in this case merely because the defendant is a member of the clergy. Likewise, the clergy malpractice claim simply requires clergy to follow the same standards of professionalism that are applied to doctors, lawyers

QUESTIONS PRESENTED – Continued

and other counselors and the elements of the tort would not differ among the professions.

If the Court eliminates the misleading phrase "special duty" from the second question presented by Petitioners and substitutes the proper term of "duty" and the phrase "based solely on religious status or affiliation" is removed, then Petitioners are merely rephrasing the issue addressed in the first question presented; i.e., whether clergy are subject to state tort laws. Therefore, Julie Mabus respectfully submits only the first question of law need be presented to this Court if Petitioners' request for review is granted.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Julie Mabus respectfully submits this Brief in Opposition to Petition for Writ of Certiorari and urges this Honorable Court to deny Petitioners' request for an interlocutory review of the order of the Circuit Court of the First Judicial District of Hinds County, Mississippi, denying Petitioners' Revised Motion to Dismiss.

JURISDICTION

Petitioners have invoked the jurisdiction of this Court pursuant to 28 U.S.C. §1257. Julie Mabus respectfully submits that 28 U.S.C. §1257 does not confer jurisdiction upon this Court due to the absence of a final judgment in this case. Petitioner asks this Court to review a denial of a motion to dismiss, which was determined by the Mississippi Supreme Court to be unfit for interlocutory appeal. The order issued by the Circuit Judge denying Petitioners' Revised Motion to Dismiss does not possess sufficient characteristics of finality, as described by this Court in *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469 (1975). In *Cox*, this Court acknowledged four categories of cases where this Court will accept a judgment as final even when there are additional proceedings anticipated in the lower state courts.

In the first category are cases where the federal issue is conclusive or the outcome of further proceedings is preordained. *Id.* at 479. In *Mills v. Alabama*, 384 U.S. 214 (1966), for example, this Court reviewed the dismissal of a criminal case on federal constitutional grounds because

the State's highest court had ordered the case remanded for trial and the defendant would have had no other defense available and no hope of prevailing on any non-federal grounds. A trial would have been pointless. The only conceivably disputed issue was presently before this Court. In Julie Mabus's case, Petitioners assert additional defenses unrelated to their First Amendment claim. It is certainly possible that the trial judge or the jury could find in favor of Petitioners, without ever reaching the federal issue. All three defendants currently have summary judgment motions pending which raise non-federal defenses.

In the second category are cases in which the federal issue will survive and require decision regardless of the outcome of future state-court proceedings. *Cox*, 420 U.S. at 480. If the Petitioners prevail at trial, the First Amendment issue will no longer require a decision by this Court. If the Petitioners prevail on their motions for summary judgment that are pending before the trial judge, the First Amendment issue will be moot.

In the third category are cases where the federal claim has been finally decided but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. *Id.* at 481. In the case at bar the federal issue has not been finally decided. In fact, summary judgment motions are currently pending before the trial court and the trial judge has already stated from the bench that he intends to reexamine the law regarding whether or not Father McBride had a fiduciary relationship with Julie Mabus at the time he considers the summary judgment motions. (App. 1-3) Furthermore, if Julie Mabus prevails at trial the Petitioners in this case would

have the right to appeal to the Mississippi appellate courts, and from there to seek review in this Court. Nothing bars Petitioners from raising the federal issues described in their questions presented during the direct appeal of an unfavorable verdict.

In the fourth and final category, are cases where 1) the federal issue has been finally decided in the state courts, 2) the party seeking review might prevail on non-federal grounds, 3) reversal of the state court on the federal issue would preclude further litigation, and 4) a refusal to review might seriously erode federal policy. *Cox*, 420 U.S. at 482-83. (emphasis added) At least two of the required four elements are not met.

First, the federal issue has *not* been finally decided in the state courts. Indeed, the trial judge stated from the bench that he would re-hear arguments about whether Father McBride had a fiduciary relationship with Julie Mabus at the time he considers the summary judgment motions. (App. 1-3) The Mississippi Supreme Court refused to review the trial judge's order denying the motion to dismiss on its merits prior to the conclusion of the trial. (Petition, App. 7-8) The same issue involving the trial judge's denial of the motion to dismiss may be raised with the Mississippi Supreme Court upon a direct appeal, at which time the Mississippi Supreme Court would have an opportunity to state Mississippi's interpretation of the federal issue raised here.

Second, a refusal to review at this premature stage of the proceedings will not seriously erode federal policy. In fact, this Court has denied certiorari in a case with identical issues of law even after a jury awarded $1,216,500.00 against an Episcopal Diocese in Colorado. *Moses v. Diocese*

of Colorado, 511 U.S. 1137 (1994). Surely if this Court found no erosion of federal policy in the face of such a verdict against a religious organization on the same theories of law, there can be no erosion of federal policy to allow Julie Mabus to proceed with her case at least until there has been a final decision on the merits. This Court has emphasized its long-standing policy against interfering in ongoing state court litigation in other doctrines. *See, e.g., Younger v. Harris*, 401 U.S. 37 (1971) (federal courts may not enjoin pending state criminal court proceedings) and its progeny. Petitioners have failed to cite a single case in support of the proposition that the Religion Clauses of the First Amendment to the United States Constitution provide blanket protection to clergy from all civil discovery.

STATEMENT OF PERTINENT FACTS, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

Julie Mabus does not dispute the Petitioners' chronology of the proceedings to date in the state courts. Petitioners' assertions that Julie Mabus intends to have a civil court interpret the religious doctrine and canons of the Episcopal Church as a basis for liability are absolutely false. Petitioners rely on a statement made by Julie Mabus's counsel in which counsel stated that experts on Episcopal doctrine might be called to testify before the court. (Petition, page 6, footnote 4) Petitioners use that statement as proof that Julie Mabus intends to probe into their religious beliefs. (Petition, page 6) A close reading of the statement of Julie Mabus's counsel will reveal the exact opposite is true.

Counsel was noting that if the church intends to call witnesses to testify in their defense that Father McBride's deceitful actions were purely a religious matter, Julie Mabus would be able to elicit rebuttal testimony that Father McBride's conduct was *not* part of the belief and practices of the religious group. *Never in any of the numerous briefs filed by Petitioners in the state courts or in this Court have Petitioners suggested that some doctrine of the Episcopal faith compelled Father McBride to act as he did.* The Colorado and Florida Supreme Courts have held that the free exercise clause is relevant only if the defendant can show that the conduct that allegedly caused plaintiff's distress was in fact rooted in religious belief. *Malicki v. Doe*, ___ So.2d ___, 2002 WL 390021 (Fla. 2002); *Destefano v. Grabrian*, 763 P.2d 275, 285-88 (Colo. 1988).[1] The

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[1] *See also Guinn v. The Church of Christ of Collinsville*, 775 P.2d 766, 773 (Okl. 1989) ("because the controversy in the instant case is concerned with the allegedly tortious nature of religiously-motivated acts and not with their acts and not with their orthodoxy vis-à-vis established church doctrine, the justification for judicial abstention is nonexistent and the [First Amendment] does not apply"); *Konkle v. Henson*, 672 N.E.2d 450, 455 n.6 (Ind. Ct. App. 1996) ("[R]eview only requires the court to determine if the Church Defendants knew of Henson's inappropriate conduct, yet failed to protect third parties from him. The court is simply applying secular standards to secular conduct which is permissible under First Amendment standards."); *C.J.C. v. Corporation of Catholic Bishop*, 985 P.2d 262, 277 (Wash. 1999) (en banc) ("The First Amendment does not provide churches with absolute immunity to engage in tortious conduct. So long as liability is predicated on secular conduct and does not involve the interpretation of church doctrine or religious beliefs, it does not offend constitutional principles."); *Martinez v. Primera Asemblea de Dios, Inc.*, 1998 WL 242412, at *3 (Tex. App. May 15, 1998) ("The Free Exercise clause has never

Mississippi Court of Appeals held in *Mallette v. Church of God Int'l*, 789 So.2d 120 (Miss. App. 2001), that a church may be sued for defamation where it disseminates information about a fired minister to unprivileged third parties. Where there is no ecclesiastical justification for the church's actions, the court stated, the First Amendment will not apply. *Id.* Counsel for Mabus was correctly pointing out in his argument that the church and diocese will be unable to prove that ecclesiastical justification exists for McBride's actions.

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immunized clergy or churches from all causes of action alleging tortious conduct. Religious groups may be held liable in tort for secular acts.") (citation omitted); *Amato v. Greenquist*, 679 N.E.2d 446 (Ill. App. 1997) ("Illinois courts may entertain lawsuits alleging tortious conduct by churches and their employees, so long as the resolution does not require the interpretation of either religious doctrine or religious duties imposed on an individual by a particular church."); *Schmidt v. Bishop*, 779 F. Supp. 321, 327 (S.D. 1991) ("tort claims for behavior by a cleric that does not require the examination of religious doctrine are cognizable."); *Winkler v. Rocky Mountain Conference*, 923 P.2d 152, 157 (Colo. App. 1995) (Where church did not contend that pastor's inappropriate touching of parishioners was based on any religious tenet or belief, trial court properly rejected church's First Amendment defense); *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315 (Colo. 1996) (minister gave no religious reasons to justify his therapeutic massaging of counselees; both minister and church could be liable); *Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church*, 63 F. Supp.2d 694, 702 (E.D.N.C. 1999) ("While the Free Exercise clause protects religious beliefs and a church's management of its internal affairs, it does not uniformly sanction all religious conduct, nor does it protect all actions taken within the context of a religious environment.)".

REASONS FOR DENYING WRIT

I. PETITIONERS' FIRST REASON IN SUPPORT OF A WRIT OF CERTIORARI IS PREMATURE BECAUSE IT DEALS WITH FINAL ADJUDICATION, AND MISLEADING BECAUSE MABUS IS NOT ASKING THE TRIAL COURT TO DETERMINE WHETHER ECCLESIASTICAL LAWS HAVE BEEN VIOLATED

Petitioners' first argument in support of granting the writ is premature because it challenges civil courts' right to adjudicate cases that involve theological controversy. In the case at bar, Julie Mabus is nowhere near a final adjudication. Petitioners' first reason actually supports Mabus's argument that review would be more appropriate by this Court when and if the trial court ever returns a final adjudication in this case.

Petitioners misrepresent that Mabus's claims are grounded on alleged violations of ecclesiastical laws and policies. Simply because Father McBride may have been violating an ecclesiastical law at the same time he was violating Mississippi tort law does not immunize him from liability under Mississippi's secular laws. To do so would place religious institutions in a preferred position over secular institutions, a concept foreign to the First Amendment. *See Sanders v. Casa View Baptist Church,* 134 F.3d 331, 336 (5th Cir. 1998), *cert. denied sub nom. Baucum v. Sanders,* 525 U.S. 868 (1998); *Malicki v. Doe,* ___ So.2d ___, 2002 WL 390021 (Fla. 2002); *Smith v. O'Connell,* 986 F. Supp. 73, 80 (D.R.I. 1997) (citing *City of Boerne v. Flores,* 521 U.S. 507, 537 (1997) (Stevens, J., concurring)); *Smith v. Raleigh Dist.,* 63 F. Supp.2d 694, 716 n.18 (E.D.N.C. 1999). Petitioners' position is tantamount to saying, if the priest

commits murder, he would be shielded from state criminal law proceedings because he was simultaneously violating one of the Ten Commandments, which is a religious doctrine prohibited from interpretation by the courts.

Petitioners cite several cases holding that the civil courts should not be allowed to resolve church property disputes (Petition, page 10) and claim that if civil courts cannot hear these cases, then Mabus's case should certainly not be heard. The Florida Supreme Court addressed that precise issue in the *Malicki* opinion released two weeks ago. In *Malicki*, the Florida Supreme Court noted that this Court has not extended the religious autonomy principle as articulated in the property dispute cases cited by Petitioners to any disputes beyond strictly ecclesiastical intrachurch disputes that have been resolved through an ecclesiastical tribunal. The Florida Supreme Court then held that negligent hiring and supervision claims would not be barred by the Free Exercise Clause, stating:

> . . . the imposition of tort liability in this case has a secular purpose and the primary effect of imposing tort liability based on the allegations of the complaint neither advances nor inhibits religion. The core inquiry in determining whether the Church Defendants are liable will focus on whether they reasonably should have foreseen the risk of harm to third parties. This is a neutral principle of tort law. Therefore, based on the allegations in the complaint, we do not foresee "excessive" entanglement in internal church matters or in interpretation of religious doctrine or ecclesiastical law.

Malicki, ___ So.2d at ___, 2002 W.L. 390021 *10 (Fla. 2002).

II. PETITIONERS' SECOND REASON IN SUPPORT OF A WRIT OF CERTIORARI IS PREMATURE BECAUSE MERELY ALLOWING DISCOVERY INTO THE FACTS DOES NOT IMPOSE ANY SPECIAL DUTIES ON PETITIONERS

The state courts have not imposed any duties on Petitioners. Should there be an ultimate adjudication of liability on the issue of breach of fiduciary duty, then Petitioners may wish to raise this argument. Now, the only ruling of the trial judge is that discovery can commence and the case will not be dismissed on the face of its pleadings. (Petition, App. 1) The trial judge may ultimately rule that Father McBride had no special relationship of trust with Julie Mabus and therefore he owed her no duty. The jury may also come to this conclusion due to the fact that in Mississippi the question of whether or not a fiduciary duty existed is a factual one and ordinarily cannot be decided on a motion to dismiss.[2] It is Mabus's contention that the facts would support a jury's determining that the relationship between Rev. McBride and Julie Mabus was a fiduciary one. At the very least, this is a question for the jury. *See, e.g., Sanders v. Casa View Baptist Church*, 898 F. Supp. 1169, 1176 (N.D. Tex. 1995), *aff'd*, 134 F.3d 331 (5th Cir. 1998), *cert. denied sub nom. Baucum v. Sanders*, 525 U.S. 868 (1998) (court held that question of whether there was a fiduciary relationship between minister and parishioners was a genuine issue of material fact to be determined at trial).

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[2] *Braidfoot v. William Carey College*, 793 So.2d 642 (Miss. App. 2000); *Smith v. Franklin Custodian Funds, Inc.*, 726 So.2d 144, 150 (Miss. 1998); *Merchants and Planters Bank of Raymond v. Williamson*, 691 So.2d 398 (Miss. 1997); *Lowery v. Guaranty Bank & Trust Co.*, 592 So.2d 79 (Miss. 1991).

Petitioner cannot credibly argue that the duty to respond to discovery is a "special" duty placed on the Petitioners merely because of their religious status. All litigants face the task of participating in discovery. Petitioners are not being singled out or treated any differently than any other litigant would be treated. Petitioners are also able to avail themselves of all protective measures available under the Mississippi Rules of Civil Procedure should any discovery request prove unduly burdensome or harassing in nature.

III. PETITIONERS' THIRD REASON IN SUPPORT OF A WRIT OF CERTIORARI IS PREMATURE BECAUSE MISSISSIPPI'S HIGHEST COURT HAS NOT YET DECIDED THE ISSUES THAT ARE IN CONFLICT ACROSS THE COUNTRY

The Chief Justice of the Mississippi Supreme Court concedes that the issues presented to this Court have not yet been determined in Mississippi. (Petition, App. 10) The fact that states differ in their interpretation of state tort laws as they are applied to clergy is even more reason why Mississippi should be allowed to forge her own body of law on the subject before this Court steps in. Asking this Court to rule now, before there has been an adjudication of liability and before the Mississippi Supreme Court has had the opportunity to consider the issues on the merits, is putting the cart before the horse.

Interestingly, Petitioners cite lengthy verbatim quotes from the case of *Ayon v. Gourley*, 47 F. Supp.2d 1246 (D. Colo. 1998) as the best example of the reasoning of the States that hold the First Amendment forecloses negligent

hiring, supervision and retention claims. When the First Amendment issues in *Ayon* were appealed up to the Tenth Circuit Court of Appeals, the appellate court refused to consider them and instead found in favor of the church on completely separate state law claims involving the statute of limitations. *Ayon v. Gourley*, 185 F.3d 873 (10th Cir. 1999) (unpublished decision). This history of *Ayon* provides a perfect example of why this Court should refrain from granting certiorari until all the avenues of appeal have been exhausted in Mississippi.

IV. PETITIONERS' FOURTH REASON IN SUPPORT OF A WRIT OF CERTIORARI FAILS TO SHOW IRREPARABLE HARM IF THE PETITIONERS ARE MERELY REQUIRED TO COMPLETE DISCOVERY.

Petitioners argue that they will face irreparable harm if they are required to submit to the process of discovery. Petitioners failed to cite any authority for the proposition that the Religion Clauses protect clergy and/or religious organizations from participating in discovery. Instead, they rely on several cases involving freedom of speech. (Petition, page 21)

Petitioners speculate that the mere fact they must attend depositions and respond to written discovery will chill their ability to practice their religion. Petitioners make no credible argument to this Court that Julie Mabus's requests will have such a chilling effect. Moreover, discovery rules enable Petitioners to object to certain inquiries, at which time the trial judge may consider

arguments from all parties and make a full and complete record on the issue.

Julie Mabus seeks to discover only facts regarding what the diocese knew about Father McBride's actions, when they knew about them, and what steps they took to avoid further harm after they learned of the acts. Julie Mabus is not seeking to inquire into religious "truths" about the Episcopal faith or religious beliefs held by the deponents. These defendants should not be allowed to stand above the laws that govern our society and use the First Amendment to shield them from accepting responsibility for tortious acts that harm others.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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EXHIBIT A

IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI

JULIE MABUS — PLAINTIFF

VERSUS — NO. 251-01-023

ST. JAMES EPISCOPAL CHURCH, EPISCOPAL DIOCESE OF MISSISSIPPI, INC., JERRY MCBRIDE AND JOHN DOES 1-10 — DEFENDANTS

* *

TRANSCRIPT OF THE PROCEEDINGS HAD AND DONE IN THE MOTION TO DISMISS OF THE ABOVE STYLED AND NUMBERED CAUSE BEFORE THE HONORABLE L. BRELAND HILBURN, CIRCUIT COURT JUDGE, ON THE 15TH DAY OF AUGUST, 2001.

* *

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* * *

RULING

[56] and a violation of that fiduciary duty by the defendants.

The Court recognizes that although it's characterized as a rule of evidence, there is statutory authority for the enforcement of a confidentiality of priest penitent conversations, and based upon the face of the pleadings, it's the finding of the Court that the motion to dismiss will be overruled.

I understand that there are summary judgment motions which would certainly be more particular in drawing a fine line in the evidence concerning, in particular, the fiduciary relationship that is set forth in the complaint.

I think at the time that those summary judgment motions are scheduled you will need to be prepared

to – well, I would prefer not to hear all of the summary judgment motions at one sitting if they're going to take an extensive period of time. I don't know how long you think your argument is going to be and whether they are going to take different courses from the defendants.

I'm just trying to think of whether we need any type of scheduling order.

BY MR. ROSS: Your Honor, could I

* * *